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IN THE COURT OF APPEALS OF INDIANA

MONTAZ LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0709-CR-806
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0610-FA-198900

April 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Montaz Lewis appeals his sentence for robbery as a class A felony.[1] Lewis raises one issue, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Lewis; and

II. Whether Lewis's forty-five-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[2]

The relevant facts follow. On October 6, 2006, sixteen-year-old Lewis, eighteen-year-old Craig Thomas, fifteen-year-old M.P., and fourteen-year-old W.H. decided to steal a bicycle on the Monon Trail. The four boys waited beside the trail for the next person to ride past. When fifty-four-year-old Darrell Arthur rode past, Lewis struck him with a 2x4 board on his head and kicked him numerous times. Thomas took the bicycle, and one of the other boys took Arthur's money. Arthur sustained multiple skull fractures, an epidural hematoma, and numerous facial fractures.[3] Arthur would have died without medical intervention, spent seven to eight days in the hospital and seven days in a rehabilitation hospital, has undergone extensive therapy, and has ongoing physical problems as a result of the assault.

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[1] Ind. Code § 35-42-5-1 (2004).

[2] The State filed a Verified Notice of Damage to Documents and offered to incur the expense for reproducing the record if necessary. However, the damage did not interfere with our ability to decide the case.

[3] An epidural hematoma is a blood clot between the skull and the lining of the brain. Transcript at 83.

On October 15, 2006, Janine Whitfield informed the police that she saw Lewis with blood on his shirt and shoes on the night of the attack. When the police executed a search warrant of Lewis's home, they found Lewis's bloody tennis shoes. Lewis eventually told the police that he and four other people, W.H., M.P., Thomas, and "Crispy," took Arthur's bicycle. Transcript at 337. Lewis said that "Crispy" struck Arthur and that Thomas took Arthur's money.

The State charged Lewis with robbery as a class A felony and aggravated battery as a class B felony.[4] A jury found Lewis guilty as charged. The trial court entered judgment of conviction on the robbery verdict only due to double jeopardy concerns. At the sentencing hearing, the trial court stated:

> [T]he Court does note as mitigating circumstances that [Lewis] is of a young age, being the age of seventeen. The court would also note as a mitigating factor, the lack of a juvenile record is also a mitigating factor. The Court does note however that the Court does not find that the lack of a juvenile record in this case is a substantial mitigating factor for several reasons. One, [Lewis] did have contact with the juvenile system. While they weren't arrests, they were contacts nonetheless, as indicated within the pre-sentence report. Secondly, the lack of a criminal history is generally considered a mitigating factor for someone who has been within the society for a long period of time and has been engaged in relatively good behavior. In this particular case, with [Lewis] being seventeen years of age, the Court does not find that this is the case. [Lewis] was not in school, in fact had been suspended from school. He was not employed, had never had an employment according to the pre-sentence report. Also within the pre-sentence report, he acknowledged regular marijuana usage as well as the evidence in the trial indicated, also that [Lewis] was in the company of individuals using marijuana and may have used marijuana himself that night. As such, because of these factors, the Court does not feel that the lack of a prior criminal history is a substantial mitigating factor, but it does

[4] Ind. Code § 35-42-2-1.5 (2004).

note that it is a mitigating factor. As to – those are the only mitigating factors that the Court sees.

The Court notes as aggravating circumstances [Lewis] committed this offense in the presence of individuals under the age of eighteen, [M.P.] and [W.H.], both being under the age of eighteen. The Court will note for the record, that the Court does consider the fact that both of these individuals could conceivably be termed co-defendants. The Court acknowledges that it is aware of that possibility and nevertheless because of the specific facts in this case, does not consider that to be an appropriate consideration. The testimony of [M.P.] and [W.H.] was that the individuals were to take a bicycle. There was talk of – the evidence showed that a brick was supposed to be used to knock Mr. Arthur, or to have Mr. Arthur be knocked from the bicycle and that the use of the 2x4 was only intended to hit the handlebars for Mr. Arthur to fall and then for the bike to be taken. That was the extent of particularly [M.P.'s] involvement, being of the age of fifteen. What [M.P.] then was exposed to in terms of the horrific beating suffered by Mr. Arthur, the Court feels as a matter of law, does constitute an aggravating circumstance here. I doubt, as Mr. Leslie has indicated and that the Court will soon indicate, that the horrific injuries were such that clearly will have just as much an impact on [M.P.] as it would have an innocent bystander as [M.P.] from his testimony and from the evidence, would not have anticipated or reasonably foreseen what was going to be coming in terms of the damage inflicted by Mr. Lewis in this matter. So the Court does find that that is the first aggravating circumstance.

The Court finds the second aggravating circumstance as previously mentioned the extreme brutality of this incident. This was a bludgeoning incident. The Court in terms of citing support from the record, refers to photographs incorporated in the trial as State's Exhibits 17, 18, 19, and 20, in which the trier of fact and the Court was able to observe the significant physical damage inflicted on Mr. Arthur's skull. The Court having either been involved in the prosecution of homicides for twenty-one years prior to becoming a judge, being on the bench for another six years after that, the Court can think of very few cases in which it's ever observed that individuals have been as badly beaten as Mr. Arthur was, whether they survived or didn't survive. But for the medical intervention of the neurosurgeon, the record showed from the evidence that Mr. Arthur would have died from his injuries. This would have been a homicide. These injuries were well beyond what was necessary to accomplish the robbery or even the injury to Mr. Arthur as charged in the charging information. One blow would have been sufficient. There is no evidence in the record that the victim ever fought back or did anything to warrant the savage beating

that he received by [Lewis]. The evidence was clear from the testimony of the other participants that Mr. Lewis inflicted multiple blows on Mr. Arthur and that these were well beyond the elements of the crime or anything that was necessary to accomplish the crime. So the severe bludgeoning and brutality of the crime, the Court cites as the second aggravating circumstance. The Court notes those to be the substantial aggravating factors.

The Court also notes further aggravating factor of the circumstances of the crime, according that this was a planned event. The individuals were lying in wait for Mr. Arthur. . . . Before the individuals went to the Monon, there was an agreement amongst all the individuals, including [Lewis], that they were going to take a bike and that they were going to take a bike by force if necessary. That in fact is what occurred. This also again in terms of the circumstance of the crime, the individuals – not only was force planned, but the individuals including Mr. Lewis were lying in wait for Mr. Arthur. From the testimony of [M.P.] and the other individuals, they stationed themselves in different locations to have different vantage points of seeing Mr. Arthur or anyone else on the trail as he approached. Mr. Arthur, according to the evidence, again was picked out for being in the wrong place at the wrong time. These individuals had a plan. They were definitely lying in wait. Mr. Lewis [sic] by all accounts and testimony, he was savagely beaten, which the Court indicated was the aggravating circumstance. The Court does find that aggravating circumstances outweigh mitigating circumstances and sentences [Lewis] to forty-five years in the Department of Correction.

* * * * *

So I think the – for those reasons, the forty-five years is appropriate. It is significant in terms of the same as being the equivalent of the low end of a homicide based on your young age. But it is an aggravated sentence based on the factors that the Court has delineated here in terms of what are mitigators and what are aggravators.

* * * * *

[F]inally I want to address the issue about your parent. I don't – [defense counsel] brought that to the Court's attention I'm sure to give the Court a better idea of what influence may have come into your life. But the bottom line is that there are plenty of people, people who have accomplished great things in this world that were orphans, people who have had bad parents. Why your parent wasn't here during your trial and during

> this sentencing hearing is totally dishonorable and no parent should have done that. I can't comment on what advice they gave you because ultimately, even at the age of sixteen, you're smart enough to listen to your attorney. You know what your options were and I'm sure your attorney very capably laid those out to you. You can't blame your parent. Ultimately you had the choice as to whether or not you accepted what the evidence was and what the legal consequences of that were. . . .

Transcript at 558-568.

I.

The first issue is whether the trial court abused its discretion in sentencing Lewis. Lewis's offense was committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that

enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

A. *Mitigators.*

The trial court here found two mitigators, Lewis's age and his lack of criminal history. However, the trial court gave little weight to Lewis's lack of criminal history. Lewis now argues that the trial court should have given his lack of criminal history more weight and that the trial court should have considered his confession and troubled family background as mitigators.

1. *Weight of Lack of Criminal History.*

Lewis argues that the trial court abused its discretion by finding his lack of criminal history was not "substantially" mitigating. In effect, Lewis argues that the trial court did not give his lack of criminal history enough weight. As noted above, the Indiana Supreme Court held in Anglemyer that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Anglemyer, 868 N.E.2d at 491. Thus, the weight assigned to Lewis's lack of criminal history is not subject to review for abuse of discretion. See, e.g., Hollin v. State, 877 N.E.2d 462, 465 (Ind. 2007) ("As for the trial court's alleged abuse of discretion in failing to properly weigh Hollin's youth as a mitigating factor, this issue is also precluded from review.").

2. *Confession as a Mitigator.*

Lewis argues that the trial court abused its discretion by failing to find that his "confession" was a mitigator. Appellant's Brief at 16. Lewis did not advance this proposed mitigator at the sentencing hearing. "If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." Hollin, 877 N.E.2d at 465. Thus, Lewis has waived this argument.

Waiver notwithstanding, we note that Lewis's statement to the police can hardly be described as a full confession. Lewis admitted to police that he was present during the assault, but blamed the actual assault on an unknown person named "Crispy." We conclude that Lewis was less than forthcoming in the "confession," and the trial court did not abuse its discretion by failing to mention it. See, e.g., Cloum v. State, 779 N.E.2d 84, 89 (Ind. Ct. App. 2002) (holding that the trial court did not abuse its discretion by failing to mention the defendant's cooperation with the police where the defendant was deceptive in his statement to the police).

3. *Troubled Family Background as a Mitigator*.

Lewis argues that the trial court abused its discretion by failing to find that his "troubled family background" was a mitigator. Appellant's Brief at 16-17. Lewis presented no evidence at the sentencing hearing to support this proposed mitigator. The only evidence regarding Lewis's family background comes from the PSI, which indicates that Lewis was raised by his mother, who was fifteen years old when Lewis was born. Lewis described "growing up in a household of four or five which received welfare assistance." PSI at 6. Lewis's father is incarcerated in Illinois after being convicted of

home invasion and aggravated discharge of a firearm at a police officer. **(PSI at 6)** At the time of the assault, Lewis was living with an uncle in Indianapolis.

The Indiana Supreme Court "has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000), reh'g denied, cert. denied, 534 U.S. 1057, 122 S. Ct. 649 (2001). In support of his argument, Lewis relies upon Scheckel v. State, 655 N.E.2d 506 (Ind. 1995). In Scheckel, the Indiana Supreme Court held that a defendant's sentence was not supported by a reasoned sentencing statement where, on remand from the Indiana Supreme Court, the trial court ignored mitigating circumstances specifically mentioned in the Supreme Court's remanding opinion. 655 N.E.2d at 508-510. Specifically, the trial court had failed to find the defendant's childhood and good work history as a mitigator and had instead noted: "Somewhere along the line a person must be held responsible for his own conduct, not society, not the government, and not the counselor's couch." Id. at 509.

Here, the trial court did not find Lewis's family history as a mitigator and stated: "But the bottom line is that there are plenty of people, people who have accomplished great things in this world that were orphans, people who have had bad parents." Transcript at 567. Unlike in Scheckel, where significant evidence of mitigating circumstances was presented, the record reveals only that Lewis was raised by a single mother, that his father was incarcerated, that he was living with an uncle at the time of the assault, and that his mother did not attend the trial or sentencing. The record reveals

no specific circumstances indicating that Lewis had a particularly troubled or traumatic childhood.

Moreover, as the State notes, Lewis failed to establish how his troubled family background led to his vicious attack on Arthur. Given the lack of evidence or correlation between Lewis's childhood and the instant assault, we cannot say that the trial court abused its discretion by failing to consider Lewis's troubled family background as a mitigator. See, e.g., Loveless v. State, 642 N.E.2d 974, 977 (Ind. 1994) (holding that "the trial court was not obligated to consider Appellant's extremely dysfunctional family background and the impact it wrought upon her as a mitigating circumstance" where "[t]here was no indication of how her admittedly painful childhood was relevant to her level of culpability and the trial court correctly refused to grant this mitigator any weight in the sentencing process.").

B. *Aggravators*.

The trial court found three aggravators, the presence of minors at the time of the assault, the extent of Arthur's injuries, and the fact that the assault was planned. Lewis argues that the trial court abused its discretion by considering the presence of minors and that the assault "could have" been a murder.

1. *Presence of Minors*.

Lewis argues that the trial court abused its discretion by considering the presence of minors as an aggravating factor. Ind. Code § 35-38-1-7.1(a)(4) provides that the trial court "may consider" the following as an aggravating circumstance: "The person: (A) committed a crime of violence (IC 35-50-1-2); and (B) knowingly committed the offense

in the presence or within hearing of an individual who: (i) was less than eighteen (18) years of age at the time the person committed the offense; and (ii) is not the victim of the offense." Robbery as a class A felony is a crime of violence under Ind. Code § 35-50-1-2(a)(12).

The trial court engaged in a lengthy discussion of this aggravator. Specifically, the trial court stated:

> The Court notes as aggravating circumstances [Lewis] committed this offense in the presence of individuals under the age of eighteen, [M.P.] and [W.H.], both being under the age of eighteen. The Court will note for the record, that the Court does consider the fact that both of these individuals could conceivably be termed co-defendants. The Court acknowledges that it is aware of that possibility and nevertheless because of the specific facts in this case, does not consider that to be an appropriate consideration. The testimony of [M.P.] and [W.H.] was that the individuals were to take a bicycle. There was talk of – the evidence showed that a brick was supposed to be used to knock Mr. Arthur, or to have Mr. Arthur be knocked from the bicycle and that the use of the 2x4 was only intended to hit the handlebars for Mr. Arthur to fall and then for the bike to be taken. That was the extent of particularly [M.P.'s] involvement, being of the age of fifteen. What [M.P.] then was exposed to in terms of the horrific beating suffered by Mr. Arthur, the Court feels *as a matter of law*, does constitute an aggravating circumstance here. I doubt, as Mr. Leslie has indicated that the Court will soon indicate, that the horrific injuries were such that clearly will have just as much an impact on [M.P.] as it would have an innocent bystander as [M.P.] from his testimony and from the evidence, would not have anticipated or reasonably foreseen what was going to be coming in terms of the damage inflicted by Mr. Lewis in this matter. So the Court does find that that is the first aggravating circumstance.

Transcript at 559-560 (emphasis added).

Focusing upon the emphasized phrase, "as a matter of law," Lewis argues that the trial court considered the presence of minors as a "mandatory" aggravator. Taking the trial court's statement as a whole, we cannot agree with Lewis's analysis. The trial court

found the presence of minors to be an aggravator, discussed competing interests, such as the fact that the minors were also involved in the offense, and then explained why the presence of minors was still an aggravator. Taken as a whole, the trial court's statement does not indicate that it considered the presence of minors as a mandatory aggravator.

Lewis also seems to argue that the trial court abused its discretion by considering this aggravator because Lewis was also a minor and the other minors at issue were involved in the offense. We have previously held that the presence of minors, even if the minors are accomplices in the offense, is a proper aggravating circumstance. Patterson v. State, 846 N.E.2d 723, 728-729 (Ind. Ct. App. 2006).

Finally, Lewis argues that there was no evidence to support the trial court's statement that M.P. was impacted by witnessing Lewis's assault on Arthur. As the State notes, M.P. testified at Lewis's trial regarding the assault, and the trial court heard his testimony and could observe his demeanor. Thus, we give deference to the trial court's determination and conclude that the trial court did not abuse its discretion by considering the presence of minors as an aggravating factor. See, e.g., id. (holding that the presence of a fourteen-year-old accomplice during a robbery was an aggravating factor).

2. *Extent of Arthur's Injuries*.

Lewis also argues that the trial court abused its discretion by enhancing the sentence because the case "could have" been a murder. Appellant's Brief at 18. Again, taking the trial court's statement as a whole, we cannot agree with Lewis's contention. In discussing Arthur's severe injuries, the trial court mentioned that, but for the medical intervention, Arthur would have died and noted that the forty-five-year sentence imposed

is also the minimum sentence for murder. However, the trial court found only three aggravators: (1) the presence of minors during the offense; (2) the extreme brutality of the offense; and (3) the fact that the offense was planned and Lewis and the others were lying in wait. It is clear from the trial court's statement that it placed significant emphasis on Arthur's extreme injuries, but it is also clear that the trial court did not enhance Lewis's sentence because he "could have" been guilty of murder.[5] We conclude that the trial court did not abuse its discretion. Moreover, even if the trial court did abuse its discretion by discussing the fact that Arthur almost died and the minimum sentence for murder, we can say with confidence that, given the severe injuries inflicted by Lewis, the trial court would have imposed the same sentence even without consideration of these circumstances.[6]

II.

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[5] In support of his argument, Lewis relies upon Hammons v. State, 493 N.E.2d 1250 (Ind. 1986), reh'g denied. However, we find Hammons distinguishable. In Hammons, the jury found the defendant guilty of voluntary manslaughter as a lesser included offense to murder. 493 N.E.2d at 1251. In sentencing the defendant, the trial court stated that it disagreed with the voluntary manslaughter verdict and enhanced the sentence in an effort to compensate for the verdict. Id. at 1253. The Indiana Supreme Court remanded for resentencing, noting that the defendant must be sentenced for "the crime of which the defendant was found guilty and not one of which he was acquitted." Id. Here, Lewis's sentence was not enhanced based upon a crime of which he was acquitted. Rather, Lewis's sentence was enhanced as a result of the horrific injuries that Arthur sustained. In discussing the injuries, the trial court noted only that, if not for medical intervention, Arthur could have died and Lewis would have been charged with murder.

[6] Lewis also seems to argue that the trial court failed to properly balance the aggravators and mitigators. As noted above, the Indiana Supreme Court held in Anglemyer that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Anglemyer, 868 N.E.2d at 491. Having determined that the trial court did not abuse its discretion when it found the aggravators and mitigators, the balancing of those aggravators and mitigators is not subject to review.

The final issue is whether Lewis's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Lewis and his three friends decided to steal a bicycle. They waited along the Monon Trail for the next bicycle rider to approach. When Arthur approached on his bicycle, Lewis swung a 2x4 board and hit Arthur across the head. After Arthur was lying on the ground, Lewis kicked him repeatedly. The savage assault was continued long beyond the time necessary to steal Arthur's bicycle, and Arthur sustained horrific injuries, as evidenced by the photographs entered into evidence at trial. Arthur sustained multiple skull fractures, an epidural hematoma, and numerous facial fractures. Arthur would have died without medical intervention, spent seven to eight days in the hospital and seven days in a rehabilitation hospital, has undergone extensive therapy, and has ongoing physical problems as a result of the assault.

Our review of the character of the offender reveals that sixteen-year-old Lewis does not have a formal criminal history. However, he was involved in two "informal contacts" as a juvenile in Illinois. PSI at 3. He also was involved in multiple disciplinary issues at school in Illinois. Lewis further admitted to smoking marijuana daily. In spite

of Lewis's youth, he inflicted particularly vicious injuries on a person who was simply in the wrong place at the wrong time. His character is also evidenced by the fact that after hitting Arthur with a 2x4 board, he repeatedly kicked Arthur.

After due consideration of the trial court's decision, we cannot say that the forty-five-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Patterson, 846 N.E.2d at 730 (holding that the fifty-year-sentence for robbery as a class A felony was not inappropriate).

For the foregoing reasons, we affirm Lewis's sentence for robbery as a class A felony.

Affirmed.

NAJAM, J. and DARDEN, J. concur